SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 188.

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Clerk.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

ALBERT E. CLARKE,
Attorney for Plaintiff in Error.

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THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

THE CASE.

This is a mandamus proceeding instituted to compel the plaintiff in error to establish and maintain a railroad station upon its line of railroad, at a point less than one mile from an existing station supplied with ample facilities. The point at which the additional station is demanded, is not only less than a mile from an existing station, but is also upon a sharp and dangerous curve. The elimination of this curve, which is only prevented by this litigation, will not affect the existing station, but cannot be made, if the judgment is sustained. The questions here involved have been litigated in two proceedings in the state courts. In the first proceeding, the District Court decided against the plaintiff in error. Upon appeal to the State Supreme Court, the judg-

ment was reversed, and the case decided in favor of plaintiff in error upon the merits. Some years later, the present proceeding, of identical character, upon the same facts, was instituted. Again the District Court entered judgment for the relator, and an appeal to the State Supreme Court was taken by the plaintiff in error. Upon this appeal, the Justices sitting, were evenly divided, the personnel of the Court having changed; the decision of the lower court being affirmed by a divided court. The only decision of the case upon the merits, by the State Supreme Court, was in favor of the plaintiff in error.

Detailed History of the Case.

The Minneapolis & St. Louis Railroad extends from the city of Minneapolis, Minnesota, in a southerly direction to Angus, Iowa, a distance of two hundred and sixty miles; crossing the state line between Minnesota and Iowa, at a point about midway between Minneapolis and Angus. The most southerly county in the state of Minnesota, crossed by this railroad, is Freeborn county. The most northerly county in the state of Iowa, upon the same line of railroad, is Winnebago county; the state line running between the two counties. A map in the back of this brief shows the location of the railroad, and the stations referred to in argument. At the time the railroad was built, the citizens of Norway township, Winnebago county, Iowa, by authority of a statute of that state, voted a tax of five per centum of the assessed valuation of all property in the township, to aid in its construction, *upon the condition* that a station should be established and maintained upon said railroad, within one mile of the northeast corner of Winnebago county. Norway township adjoins the state line on the south; is the northeast township in Winnebago county, Iowa, and is the first township entered by the railroad after crossing the state line, from Minnesota. Pursuant to this agreement, *made at the time the railroad was built, in consideration of the aid voted*, a station named NORMAN, was established, and has ever since been maintained. *Printed Record, page 58, folio 92.*

The station of Norman is located close to the line

which constitutes the southern boundary of Minnesota, and the northern boundary of Iowa. The state line is also the northern boundary of the village of Norman. At this station, the Railroad Company, the plaintiff in error, maintains a good passenger and freight depot, business tracks, stock yards, etc. The facilities are ample to accommodate the business of the station. *Record, page 40, folio 58.*

The country in this vicinity is purely agricultural, fairly well settled, and I do not think any claim will be made that the facilities are not *sufficient.* Several years after the establishment of Norman station, a little settlement called EMMONS, sprung up on the Minnesota side of the line. This little village was immediately north of the state line, and adjoining it; so that the state line was also the boundary line between the two villages.

The distance from the *station* at Norman, to the corporate limits of Emmons, by rail, is but fifty-six one-hundredths of a mile; *a trifle over half a mile.*

The distance from Norman station to the *business center* of Emmons, by rail, is but seventy-seven one-hundredths of of one mile; *a trifle more than three-quarters of a mile. Record, page 39, folio 57.*

By wagon road, the distance from Norman station to the business center of Emmons, is ninety-three one-hundredths of a mile. *Record, page 39, folio 57.*

To accommodate the people of Emmons, the plaintiff in error built a spur track, so that all car-load business for Emmons, is handled on this spur track, to and from the Norman yard. *Record, page 40.*

The first station north of Norman, is Twin Lakes, Minnesota; distant but six and fifty-four one-hundredths of a mile from Norman. The first station south of Norman, is Lake Mills, Iowa; distant five and seven-tenths miles from Norman, and twelve, and twelve one-hundredths miles, from Twin Lakes, within which last named distance, the *three stations* are situated.

The plaintiff in error refused to establish an additional station at Emmons, less than a mile from the existing station of Norman, and prior to June 1899, the citizens of Emmons caused a mandamus proceeding to be instituted by the

State of Minnesota ex rel. the Railroad and Warehouse Commissioners, to compel plaintiff in error to establish and maintain such station. The application for the mandamus was based upon two grounds; First: Upon a statute of Minnesota which requires "all railroad corporations or companies operating railroads in the state, to provide passenger and freight stations at all villages and boroughs on their respective roads;" and, second: Upon the power of the Commissioners under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot at any place, *incorporated or unincorporated* where public necessity or convenience reasonably requires it to be done.

Upon trial of the mandamus proceeding in the District Court of Freeborn County, Minnesota, judgment was given for the relator and against the plaintiff in error.

On appeal to the State Supreme Court the judgment of the District Court was reversed; and all the issues decided in favor of the plaintiff in error. Although a new trial was ordered, no new trial was taken or asked for by the relator.

By the decision of the State Supreme Court in the proceeding referred to, it was adjudicated: First: That the contention of the state, that the statute requiring railroad companies to maintain stations "at all villages and boroughs on their respective roads" was not applicable to the case, because Emmons was not at that time, incorporated; and that the word "village" as used in the statute, means an "incorporated village" and the word "borough" means an "incorporated municipality." For these technical reasons, it was held that the statute had no application. The reason for inviting attention to this fact will appear later.

The State Supreme Court held however, that under the general Railroad and Warehouse Commission Act, and without reference to statute referred to, the state had full power to require the establishment and maintenance of suitable passenger and freight stations at any place "incorporated and unincorporated," where public necessity or convenience requires it to be done. Having thus held, the Court proceeded to examine and decide the case upon the merits. The opinion, which will be found in *76 Minnesota*, pages 472 to 480, is as follows:

First Opinion of the State Supreme Court.

"MITCHELL, J.

The railroad and warehouse commissioners, upon the petition of numerous citizens, and after a hearing at which the railway company appeared and opposed the granting of the petition, made an order requiring the Minneapolis & St. Louis Railroad Company to build and maintain at Emmons, a small, unincorporated village on the line of its road, a station house for the convenience of the public, the outside measurement of which should be 16 feet by 44 feet, and which should contain a waiting room, of the width of the building, and at least 18 feet long, and suitably lighted and heated, for the accommodation of the traveling public, with suitable platforms for the purpose aforesaid, and that the same should thereafter be maintained as a regular station house of the company. The railway company having refused to comply with the order, the state, on the relation of the commissioners, applied to the district court for a writ of mandamus to compel it to do so. The railway company appeared and answered to the alternative writ of mandamus. Upon the trial the only evidence introduced by the state was the findings of the railroad and warehouse commissioners. The railway company introduced no evidence. The court found, as a conclusion of law, that the relators were entitled to a peremptory writ of mandamus compelling the railway company forthwith to comply with the order of the commissioners, and from the judgment entered accordingly it appealed to this court.

It becomes important, at the outset, to determine whether this action, and the order sought to be enforced by it, are based upon the provisions of Laws 1897, c. 94, or upon the powers granted to the railroad and warehouse commissioners by the general railroad and warehouse commission act (G. S. 1894, c. 6, tit. 9), and particularly section 388. This depends upon the construction to be given to the word 'village,' as used in the act of 1897. That act provides

> 'That all railroad corporations or companies operating any railroads in this state shall * * * provide at all villages and boroughs on their respective roads, depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight, * * * Such railroad corporations or companies shall at all such depots or stations stop their trains regularly as at other stations to receive and dis-

charge passengers, and, for at least one half hour before the arrival, and one half hour after the arrival, of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid.'

While the word 'village' is often used to apply to any small assemblage of houses for dwelling or business, or both, in the country, whether incorporated or unincorporated, yet we are satisfied that the word, as used in this statute, applies exclusively to incorporated villages. In the first place, the maxim, 'Noscitur a sociis,' applies. The word 'village' is used in connection with the word 'borough,' which is never applied to any place except an incorporated municipality. See title 'Borough,' 4 Am. & Eng. Enc. (2d Ed.). We have several boroughs created by special charter in the early history of the territory and state, the name having been evidently borrowed from some of the eastern, middle or border states, such as Pennsylvania, where it is in common use. In the second place, the duties imposed on railroad companies by this act are mandatory, apply to all villages, and are imposed by the legislature itself, and not left to the discretion of the railroad and warehouse commissioners, according as they may or may not determine that public necessity or convenience requires a passenger or freight station to be provided at a particular village. Hence, if the word 'village,' in this act, is to be given its general popular meaning, as contended for by counsel for the relators, it would be the absolute duty of a railroad company to provide and maintain such a station at every little hamlet along its line, without regard to its size or the amount of its business, and without regard to its proximity to other stations, or to the necessities or convenience of the public. *It is not to be lightly assumed that the legislature intended to impose any such onerous and unreasonable duties upon railroad companies. Indeed, it is more than doubtful whether any such act could be upheld as a legitimate exercise of the police power of the state.*

If the statute is limited to incorporated villages, the duties imposed are still sufficiently onerous, yet they could be said to have *some* reference to public convenience; for, to authorize the incorporation of a village, there must be at least 175 inhabitants in a compact and contiguous tract of territory, urban and semiurban, and not strictly rural in its character. G. S. 1894, § 1200; State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972. And, lastly, if the statute is

construed as applying to all villages, in the popular sense, whether incorporated or unincorporated, there is no definite rule by which to determine to what place this mandatory duty of providing a depot and station applies. Who is to determine whether a given place has ceased to be strictly rural, and has become so far urban or semiurban in its character as to be entitled to be called a village, even in the general and popular meaning of that word? The railroad and warehouse commissioners themselves are evidently of opinion that the statute applies only to incorporated villages, and we have no doubt that in this they are correct.

2. But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where *public necessity* or *convenience, reasonably* requires it to be done. *But this power is neither absolute nor arbitrary.* The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large *and of the railroad company itself*, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the place in question. Counsel for the relators admit this. The only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether the facts therein stated reasonably justified their order requiring the railroad company to provide and maintain a depot and station at Emmons. The statute provides that,

> 'Upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners] the findings of fact of said commission as set forth in its report shall be prima facie evidence of the matters therein stated.' G. S. 1894, § 399.

The power of the legislature to establish this rule of evidence is so well settled that we deem it unnecessary to occupy time in argument, or the citation of authorities, in support of the proposition. It will be noted that it is the facts found by the commissioners, and not the conclusions which they draw from those facts, which are made prima facie evidence.

The facts found by the commissioners are, in substance, as follows:

First. That Emmons is on the line of the appellant's road, near the Iowa line, and has a population of about one

hundred. It has three stocks of general merchandise, two hardware stores, three blacksmith shops, two restaurants, one furniture store, one drug store, one lumber and coal yard, one grain elevator, one feed mill, one creamery, one butcher shop, one livery stable, and 14 or more dwelling houses; and tributary thereto is a rich and populous agricultural country, which extends to a distance of 15 or 16 miles in a westerly direction, and 5 or 6 miles in other directions. That it is 5 7-10 miles from Emmons to the first railroad station on the line of said railroad north of it, and there is no station on the line of said railroad south of Emmons within the state of Minnesota. That there is a station called 'Norman,' in the state of Iowa, 7-10 of a mile by rail, and one mile by wagon road, from Emmons; but said Norman, being within the state of Iowa, is not subject to the jurisdiction or control of this commission.

Second. That the respondent has built and maintains a spur track at Emmons for the reception and delivery of freight in carload lots, but that all business transacted by the people of Emmons, and of the country tributary thereto, with said railroad company, other than loading and unloading car-load freight, under existing conditions, is necessarily to be transacted at Norman; and in consequence thereof the people of Emmons are subjected to much inconvenience, expense and annoyance, and are required to go without the state of Minnesota, into the state of Iowa, for the transaction of such business.

Third. That during the year ending December 31, 1896, there was shipped from Emmons, on said railroad, butter, on which freight charges were collected amounting to $2,004.69; 101 car loads of grain, on which freight charges were collected amounting to $5,552.88; 74 car loads of live stock, on which freight charges were collected amounting to $3,153.45; three car loads of hay, on which freight charges were collected amounting to $97; and one car load of emigrants' movables, on which freight charges were collected amounting to $16.62,—making the total collection of freight charges on out-going freight during said time $10,824.64. That during the same period there was shipped to Emmons merchandise, in less than car loads, on which freight charges were collected amounting to $1,199.42; 42 car loads of lumber, on which freight charges were collected amounting to $1,929.24; 33 car loads of coal, on which freight charges were collected amounting to $1,237.58; three car loads of salt, on which freight charges were collected amounting to $186.80; one car load of farm machinery, on which freight charges were collected amounting to $47.70; one car load of wire and nails,

on which freight charges were collected amounting to $84.64; two car loads of stone, on which freight charges were collected amounting to $54.62,—making the total collection of freight charges on incoming freight during said period $4,689.80, and a total of freight charges collected on incoming and outgoing freight during said period of $15,514.44.

'That figures were not furnished this commission for the business of 1897, except on grain shipments up to the time of the hearing, which amounted to 178 car loads, from which we estimate, and so find, that the freight charges for the year 1897 *on incoming and outgoing freight at Emmons exceeded $20,000.* We are unable to find the receipts of the railroad company upon passenger business at Emmons, for the reason that, under existing conditions at Emmons, passengers, either incoming or outgoing, are required to take the cars or alight therefrom at Norman.'

What follows consists merely of inferences and conclusions drawn from these facts.

It is apparent from this that the surrounding country is strictly rural and agricultural, although, as the commissioners say, rich and prosperous; also, that the existing stations on appellant's road (Norman) south and (Twin Lakes) north of Emmons are only 6 4-10 miles apart, which the courts will take judicial notice is not greater than the ordinary distance between stations in the rural and agricultural portions of this state. *There is no finding that the facilities at the station of Norman for both freight and passenger traffic are not ample for the accommodation of the public.*

The only objections found against it (Norman) are that it is just over the line in the state of Iowa, and hence not subject to the jurisdiction of the relators, and that the people of Emmons and vicinity are compelled to go into the state of Iowa for the purpose of transacting business with the railroad,—*considerations which, in our judgment, are not entitled to a particle of weight.* It may be unfortunate for Norman that it is not in this state, so as to be subject to the jurisdiction of our railway and warehouse commission; but Iowa is generally supposed to be a civilized state, whose laws provide security for life and property as effectually as our own, and which exercises as efficient police power over common carriers as Minnesota. In trade and commerce, state lines go for nothing. A citizen of Minnesota who goes into Iowa is still in his own country, and has to pay neither a poll tax to enter, nor an import or export tax on his property. It is

commendable in citizens of Minnesota to attempt to build up their own state in every proper way. It is also a commendable ambition on the part of the inhabitants of Emmons to benefit their own village, and themselves individually. But this is no reason why these things should be done at the expense either of the appellant or the public at large. If any such narrow, provincial policy should obtain, every state line in the country would be flanked by double stations at every point where a railroad crossed it.

The suggestion that the station at Norman may be discontinued is frivolous. It will be time enough to take that into account when it happens. *It appears that the station at that place is only one mile by wagon road from Emmons. We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities and the railway passenger or freight stations which accommodate them; also, that it is as short as or shorter than the distance between many country depots or stations and the nucleus of buildings constituting the business center of the station village.* There is no suggestion that there are any special physical obstacles or difficulties in the way of traveling the one mile of highway between Emmons and Norman. Neither is there any claim that, in locating its stations at Twin Lakes and Norman, the railroad company acted arbitrarily, unreasonably, or in disregard of the convenience of the public.

The aggregate of freight charges on freight going to or from Emmons during a year was $15,514, which at first sight seems like quite a large sum; but, when it is considered that this presumably includes the total freight charges from the places of shipment to the places of consignment, it is apparent that the gross earnings of the appellant on this freight must be a very much less sum, and its net earnings a still much smaller sum. It is also to be observed that the great bulk of this freight, representing at least $12,360 out of the $15,514 freight charges, was shipped in or out in car-load lots which was already amply accommodated by a side track at Emmons, thus leaving freight representing only $3,154 of the freight charges (assuming that the item of butter was shipped out in less than car-load lots) which will be benefited by the establishment of a regular depot or station at Emmons. And, when the nature of the freight shipped in car-load lots is taken into account, it doubtless represents a considerably greater proportion of the bulk or weight of the total freight than is indicated by its proportionate share of the freight charges. The commissioners report that they were unable for a very good reason, to ascertain what the

receipts of the appellant upon passenger business at Emmons were or would be; but it is evident that it would be inconsiderable from the village itself, and comparatively small even including the rural population of the so-called "tributary territory," especially in view of the fact that much of this must be approximately equi-distant from one or the other of the two neighboring existing stations and Emmons.

Our conclusion is that these facts did not justify the commissioners in the first instance, or the district court on appeal, in ordering the appellant to provide and maintain this station within seven-tenths of a mile of an existing station; that in the light of the facts, the order was unreasonable.

We are firm believers in the existence as well as the exercise of the police power on the part of the state over common carriers, *but this power must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute. The undue multiplication of railway stations does not increase the traffic either passenger or freight. It simply divides the existing traffic among more places. It unnecessarily increases the expense of doing the business (which comes out of the railroad company in the first instance, but at last out of the public,) diminishes the quality of the service of the road to the public by the unnecessary frequency of the stops of trains, and increases to some extent the hazards of railroad traffic and travel.* As already suggested, in determining whether a station should be provided and maintained at a particular place, the interests, *not merely of that immediate locality, but also of the railroad company, and especially of the public at large,* must be taken into consideration. It seems to us that the commissioners, in making this order, must have been unconsciously influenced by the fact that the station at Norman was on the other side of the state line, *and that, if it had been on this side, they would never have ordered the appellant to provide another station within seven-tenths of a mile of it.*

Judgment reversed, and a new trial granted."

I have quoted the opinion in full, in order that this court may see that the facts as stated therein, are, so far as they furnish reasons to support that decision, equally controlling in the case at bar.

The relator, The Railroad and Warehouse Commission did not avail itself of the new trial granted by the State Supreme Court, under the Minnesota practice, but permitted the proceeding to lapse; but, in October, 1901, upon a second

petition of citizens of Emmons, it made a second order requiring the plaintiff in error to establish and maintain the station. In the interim, the village of Emmons was incorporated, thus removing the technical objection. The Railroad Company failing to comply with the order, the present mandamus proceeding was instituted.

The petition for the temporary writ of mandamus states the official capacity of the relators, and their authority; the corporate existence of the plaintiff in error, the location of its line of road, the existence of Emmons, and the fact that it has no depot; that there is, at that point, a suitable location for a depot, and that the business of Emmons exceeds $12,000 per annum.

It also recites the fact that the order of the Commission, by which the Railroad Company was directed to build the depot, has not been complied with, and prays for the issuance of the writ. It does not state that the citizens of Emmons are not supplied with adequate *railroad* facilities, but only states that the "defendant's railroad has no *station* facilities whatever, *at said village of Emmons.*" *See pages 8, 9 and 10, Printed Record.*

The answer to the petition for the alternative writ, and the return to the writ, sets out the facts hereinbefore stated, as to the relative location of the stations of Twin Lakes, Norman and Lake Mills. It recites the establishment and maintenance of Norman station, pursuant to the contract under which the tax was voted for the construction of the railroad; alleges the sufficiency of the railroad facilities supplied by the existence of the station and yard tracks at Norman and the spur track connecting Emmons with the Norman yard, upon which all the car-load business of Emmons is handled, and alleges further that the laws of Minnesota under which the proceeding is instituted, is as applied to the facts in this case, violative of the Federal Constitution in that it denies the plaintiff in error the right to reasonably manage or control its own business; it takes its property arbitrarily and unnecessarily, for public use, without just compensation; it deprives the plaintiff in error of its pro-

perty without due process of law, and denies it the equal protection of the laws.

Upon the appeal from the judgment of the District Court, to the Supreme Court of the state, that tribunal handed down the following opinion, found at page 65 of the Printed Record:

Second Opinion of State Supreme Court.

"PER CURIAM.

This is the second attempt on the part of the citizens of the village of Emmons, situated on defendant's line of road, to secure a depot building for the accommodation of the people residing there and in that vicinity.

Their first was in the year 1897, when they proceeded by petition to the railroad and warehouse commissioners, upon which a hearing was had, and an order filed requiring the defendant company to build and maintain a depot within a prescribed time. It refused to comply with this order, and the state, on the relation of the commissioners, sought to compel obedience by mandamus. On the trial the court below found against the company, and from a judgment, subsequently entered, an appeal was taken to this court, where the judgment was reversed, and a new trial granted. 76 Minn. 469, 79 N. W. 510, wherein the facts are stated. We assume that this proceeding was abandoned, because in 1901 another was instituted of the same character and for the same purpose. After a hearing the commissioners made a second order, requiring the building and maintenance of the station house or depot as prayed for, and, as before, the railway company refused to obey. Thereupon another mandamus proceeding was instituted in the district court. The present appeal is from a judgment entered therein, commanding the railroad company to build and maintain a station house or depot upon a certain described tract of land within the village, which became incorporated under the provisions of G. S. 1894, § 1200, just prior to the commencement of this action.

Associate Justice LOVELY, having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court.

We assume that Laws 1901, c. 270, which in express terms requires railway companies to build and maintain

depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this state located on railway lines are prima facie entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof, for prior to its enactment the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railroad company appearing before the commissioners, or trying its case on appeal to the district court, bears the burden of showing that such a requirement is not called for, and that the building and maintenance of a depot in the village is unnecessary and unreasonable.

But while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Chief Justice START and Associate Justice BROWN, are of the opinion that from the evidence it appears that there has since been a substantial growth in the village,—a growth which makes an altogether different showing,—and that the company did not overcome the prima facie case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justices COLLINS and LEWIS are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered, and that the prima facie case made by the village has been wholly overcome by the defendant company.

With this difference of opinion, the judgment appealed from must be, and hereby is, affirmed."

Before taking up the argument, I will briefly call attention to the evidence taken upon the hearing in the District Court, for the double purpose of showing that the situation *as to all material facts* was identical with the situation exist-

ing at the time of the first trial, and that the Supreme Court of Minnesota has, in fact, held the law, as applied to the facts in this case, to be unreasonable, unconstitutional and void. Also, that that decision has never been overruled except by the decision of an inferior court.

The Following Facts are Established by Undisputed Evidence.

The village of Emmons is situated upon the present line of the Minneapolis and St. Louis Railroad, the corporate limits of the village extending to the south line of the state. The distance from the business center of the village to the depot at Norman, a regular station, upon the same railroad, is but three-fourths of one mile measured along the railroad. *Record, page 39, folio 57.*

Measured along the wagon road the distance is less than one mile. *Record, page 21 folio 25, also page 39, folio 57.*

The distance from Norman to Twin Lakes, the first station north, is six and fifty-four one-hundredths miles; and from Norman to Lake Mills, the first station south, the distance is six and fifty-four one-hundredths miles; so that, leaving Emmons out of the case, there are three stations within twelve and twelve one-hundredths miles; a little more than six miles apart, a distance of which the court says, it "will take judicial notice, is not greater than the ordinary distance between stations in the rural and agricultural portions of this state." *See 76 Minn., 477; page 9, this brief.*

The station of Norman was established many years ago, under a contract, pursuant to which a tax was voted to aid in the construction of the railroad. The station was established when the road was built, and has ever since been maintained at its original location. *Page 58, folio 91, Printed Record.*

The order of the commission requires the establishment and maintenance of an additional station at Emmons, at a point which will be about one-half mile from the railroad, if a contemplated and necessary change in its alignment, is made. This change is made necessary by the existence of a series of dangerous curves and a heavy grade, in the present track, between the stations of Twin Lakes and Norman.

These curves, together with the proposed change in the line, are shown upon Exhibit No. 3, on file with the clerk of this court. The present grade is one per cent. By the proposed alteration the curvature is reduced from 216 degrees, 17 minutes, to 25 degrees, 17 minutes; replacing a series of dangerous reverse curves, by a simple "one degree" curve; reducing the maximum grade from one per cent., to six-tenths of one per cent., and shortening the line several hundred feet. Surveys and estimates for this change are already made. The proposed change in alignment is necessary. *See testimony of Civil Engineer* W. D. WHEELER, *pages 43-44, and testimony of Superintendent* A. P. TANNER, *pages 57-58.* This testimony is uncontradicted. An examination of the exhibit referred to, will enable the court to understand the situation at a glance. Enforcement of the order of the commission will make this necessary improvement impossible, or compel the construction of a station which will be useless and worthless when the change in alignment is made.

The corporate limits of Emmons, include eight hundred acres of land, upon which there are but fifty houses, including both business houses and dwellings. The population of this tract of eight hundred acres, does not exceed two hundred and fifty people. *Printed Record, page 34, folio 48; page 41, folio 60.*

At Norman, the plaintiff in error has a yard and station, which furnish ample facilities for all the business at that point, *including the business of Emmons.* There is a spur track at Emmons upon which all the carload traffic to and from that village is handled. *See page 40, Printed Record.* The exhibit referred to, which shows this spur track, is filed with the clerk of this court.

The switching of cars thereon, is done by the engines hauling the trains which stop at Norman; the cars being handled in the Norman yard. As to *car load* shipments, all the requirements of Emmons are met by this spur track, which furnishes the same accommodations which would be supplied by the establishment of a station, viz: the opportunity to load and unload grain, stock and all car load shipments directly into and from the car.

This car load business includes nearly all the business of the village.

The evidence upon this point, which is undisputed, will be found at pages 37 and 38 of the Printed Record, and is, for convenience, divided into "freight forwarded" from Emmons, and "freight received" at Emmons.

FREIGHT FORWARDED.

The evidence shows that the total charges upon all freight shipped from Emmons during the fiscal year was $12,798.34, of which $10,401 was derived from car load shipments; leaving only $2,397.34 to represent earnings on all shipments from Emmons, handled in less than car load lots. Of the total earnings on freight forwarded ($12,798,34), but $8,813.-04 was earned by the plaintiff in error, and was divided as follows: On car loads, $7,748.70; in less than carloads, $1,064.34. This latter sum ($1,064.34) represents the total earnings of the plaintiff in error, at Emmons, on freight forwarded from that village other than in car loads. The balance, in excess of $8,813.04, was earned by other carriers.

FREIGHT RECEIVED.

The total charges upon all freight received at Emmons during the year amounted to $7,547.62, of which $5,409.29 was upon car loads, and but $2,183.33 on less than car load shipments. Of this total charge upon "freight received" the plaintiff in error's earnings were $4,789.16, the balance being earned upon other lines of railroad.

Of the $4,789.16 earned by the plaintiff in error, $3,058.73 was upon carloads, and but $1,730.43, on less than car loads.

RECAPITULATION.

To recapitulate and tabulate the evidence, the record is as follows:

Total earnings *of all carriers*, on business to and from Emmons during the fiscal year:

Freight forwarded	$12,798.34
Freight received	7,547.62
Total	$20,345.96

This is made up of Earnings on car loads:

Freight forwarded	$10,401.00	
Freight received	5,409.29	
		$15,810.29

Earnings on less than car loads:

Freight forwarded	$2,397.34	
Freight received	2,138.33	
		$ 4,535.67
		$20,345.96

Of this sum of $4,535.67, *which represents the total earnings on shipments, in less than car loads*, the plaintiff in error earned but $2,794.77, as follows:

Freight forwarded	$1,064.34	
Freight received	1,730.43	
		$ 2,794.77

The remainder was earned by connecting lines.

This sum, $2,794.77, represents the *total business* of Emmons, not already accommodated by the side track, which furnishes the same terminal facilities which would be afforded for car load business, if a station were built; as car load business is never handled through the depot.

This sum ($2,794.77) also represents the GROSS earnings of the plaintiff in error on all its business at Emmons, except car load business, which is fully accommodated by the side track already built,

The point at which the plaintiff in error is required to construct the proposed station, is, upon its maximum grade—one per cent. This grade would make it impossible to start a maximum train, going north, after it came to a stop at the proposed station. *Record, page 42; also pages 56-57.*

The actual cost of the construction of a standard yard at Emmons, with a depot building of the character constructed by the plaintiff in error at all stations of that class, including the necessary grading, tracks, switches, and ordinary instrumentalities, would be $14,265. It would cost, to maintain the station, between $900 and $1,000 per annum.

Norman has thirteen business houses, a depot building 30 by 50 feet, and ample railroad facilities. The road from Emmons to Norman is an ordinary country road; and is, in the spring, muddy, and, for a few days, impassable, so that travelers have to go through the fields.

THE ISSUES.

It is claimed by the Relator, that the State, acting through its Railroad and Warehouse Commission, has full power and authority to establish the station as prayed.

First. Under the provisions of the general railroad and warehouse commission act; Chap. 6, Title 9, Gen. Stat. 1894; particularly Sec. 388.

Second. Under the provisions of Chap. 270, Gen. Laws of 1901.

The Plaintiff in Error says, that, under the existing conditions, as disclosed and established by the undisputed evidence, the establishment and maintenance of a station, at Emmons, is wholly unnecessary; the requirement of the commission, unjust, unreasonable and unwarranted.

It says further, that any, and all laws of this state, including the acts hereinbefore specified, which require the establishment, and maintenance, of stations without regard to the location or situation of the villages or boroughs at which they are to be established and maintained, and without regard to existing conditions, are unjust, unreasonable, contrary to public policy, and void; and are violative of both state and federal constitutions.

Said laws and statutes deny to the Plaintiff in Error the right to reasonably manage, and control' its own business; and take its property without its consent. They authorize the taking of its property, arbitrarily and unnecessarily for public use, without just compensation.

She said laws, and statutes, deprive the Plaintiff in Error of its property without due process of law; and assume to authorize the taking thereof, without due process of law; and by the enactment and enforcement of said statute it is denied the equal protection of the laws; all of which is in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The Supreme Court of the state, by a decision which has not been overruled, modified or criticised, has, in no measured terms, placed the seal of its disapproval upon the attempt to compel the plaintiff in error to establish and maintain a station at Emmons. The decision was not limited to the technical questions involved, but was broad, comprehensive, and upon the merits. In the former proceeding the relator attempted to justify its order for the establishment of the station, under two statutes, viz: (1) Under the section 388, Gen. Stat. of 1894, and (2) under chapter 94, Gen. Laws of 1897.

Sec. 388, Gen. Statutes of 1894, is that section of the general railroad and warehouse commission act which defines the powers and duties of the commission. It undoubtedly confers ample power and authority upon that body, to require the establishment and maintenance of stations, in proper cases, and this court so held; but also held that this was not a proper case.

Chapter 94, Gen. Laws of 1897, reads as follows:

SEC. 1. All railroad corporations, or companies, operating any railroads in this state, shall, within a reasonable time after the passage and approval of this act, provide at all villages, and boroughs, on their respective roads, depots, with suitable waiting rooms, for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight, and at all stations in villages of one thousand (1,000) inhabitants or over, all such railroad companies, or corporations, shall provide a separate waiting room for ladies, and a separate waiting room for gentlemen, both of which said waiting rooms shall be properly and comfortably furnished, heated, lighted and ventilated, which said rooms shall each be at

least equal in size to fifteen (15) feet by eighteen (18) feet square, with a height of ceiling at least ten (10) feet above the floor; and that all villages of less than one thousand (1,000) shall have at least one (1) such waiting room; and waiting rooms in all cases, when necessary, shall be constructed of such greater size as to accommodate all passengers patronizing such railroad at any station.

Such railroad corporations or companies shall, at all such depots or stations, stop their trains regularly, as at other stations, to receive and discharge passengers; and for at least one-half (½) hour before the arrival and one-half (½) hour after the arrival of any passenger train, cause their respective depots or waiting rooms to be kept open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid. And where the annual business of any railroad company at any such station amounts to fifteen thousand dollars ($15,000) or more, based upon the outgoing and incoming freight and passenger traffic, then such railway company shall keep an agent at said depot during the business hours of each business day during the entire year; and any railroad company violating the provisions of this act shall be subject to the penalty as provided in section two (2) of chapter one hundred and ninety (190) of the general laws for the year one thousand eight hundred and eighty-five (1885.)

Provided, That the Railroad and Warehouse Commission may authorize the withdrawal of such agent at depots where the business is periodical, during such time as there is no business at any such station.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 3, 1897.

The above chapter was re-enacted by the general assembly of 1901, as chapter 270, General Laws of 1901, with the following changes:

The provision that where the annual business of the station amounts to $15,000, an agent shall be at the depot during the business hours of each day, is amended by substituting the sum of $8,000 for the sum first named, and adding the words, "except at stations where receipts from outgoing and incoming freight and passenger traffic for any consecutive three months shall not amount to fifteen hundred ($1,500) dollars."

These wholly unimportant amendments, together with

the subsequent incorporation of the village, seem to be the basis for this proceeding; the evident purpose of which is to secure a rehearing of the case upon the same facts, so far as the case of the relator is concerned, and to induce this court to overrule its decision, without any meritorious or substantial reason.

Upon the former trial, the plaintiff in error urged the objection, that chapter 94, General Laws of 1897, if valid, had no application; it being, in terms, limited to "villages" and "boroughs." That the word "village," when used in a statute, means an *incorporated* village, and that a "borough" is an incorporated village. This contention was sustained by this court; and, to meet this contention, Emmons has since been incorporated. In view of the fact that this objection was technical, and did not go to the merits of the controversy, this court, upon the former appeal, proceeded to determine the case *upon the merits;* it being urged by the relator that its order was justified by the general railroad and warehouse commission act; section 388, Gen. Stat. 1894.

Construing the act of 1897, the court held that Emmons was neither a statutory village nor a borough; and in defining a "borough" took occasion to say, at 76 Minnesota, page 474, that "It is not to be lightly assumed that the legislature intended to impose any such onerous and UNREASONABLE duties upon railroad companies." After denying the authority of the commission to make the order under chapter 94 of laws of 1897, it was held that the general railroad and warehouse commission act confers upon the commission, authority to require a railroad company to provide a suitable depot-building at any place, *whether incorporated or unincorporated*, where public necessity or convenience REASONABLY requires it to be done. Under this general law, the court proceeded to examine into the necessity for a depot at Emmons; and in clear, forcible and comprehensive language, held the requirement to be wholly unreasonable. The right to the establishment of this proposed station, under authority of the general railroad and warehouse commission statute, is adjudicated in favor of the appellant. By such adjudication, it is determined that it is not reasonably required by public necessity,

or convenience. It is held (1)—That the general railroad and warehouse commission act confers jurisdiction upon the commission, to require the construction of stations when public necessity, or convenience reasonably requires it; (2)—That public necessity and convenience do *not* reasonably require the construction of a station at Emmons. It follows, therefore, that the chapter 270, Gen. Laws of 1901, *as applied to this case*, requires the construction of a station, at a point where it is not reasonably required by public necessity, or convenience. Counsel for the relator, in this proceeding, based his argument in the trial court both upon the general railroad and warehouse commission act (particularly, Sec. 388, G. S. 1894), and upon chapter 270, laws of 1901.

In order to find support for the order under the general act (Sec. 388, G. S. 1894), the relator must show a reasonable public necessity for the station; and in determining whether such necessity exists, as was said by Justice Mitchell, (76 Minn. 475), regard must be had to the interests "not only of the particular locality, but also of the public at large, and of the railroad company." Every conceivable argument which can be made in support of the order of the commission, in this proceeding, is conclusively answered by the able and comprehensive opinion of Mr. Justice Mitchell, upon the former trial. Referring to the argument that Norman station is in Iowa, he says, at pages 477-478:

"The only objections found against it (Norman) are that it is just over the line in the state of Iowa, and hence not subject to the jurisdiction of the relators; and that the people of Emmons and vicinity are compelled to go into the state of Iowa for the purpose of transacting business with the railroad, *considerations which, in our judgment, are not entitled to a particle of weight.* It may be unfortunate for Norman that it is not in this state, so as to be subject to the jurisdiction of our railway and warehouse commission, but Iowa is generally supposed to be a civilized state, whose laws provide security for life and property as effectually as our own, and which exercises as efficient police power over common carriers as Minnesota. *In trade and commerce, state lines go for nothing.* A citizen of Minnesota who goes into Iowa is still in his own country, and has to pay neither a poll tax to enter, nor an import or export tax on his property. It is

commendable in citizens of Minnesota to attempt to build up their own state in every proper way. It is also a commendable ambition on the part of the inhabitants of Emmons to benefit their own village, and themselves individually. But this is no reason why these things should be done at the expense, either of the appellant, or the public at large. *If any such narrow, provincial policy should obtain, every state line in the country would be flanked by double stations at every point where a railroad crossed it.*

The suggestion that the station at Norman may be discontinued, is frivolous. It will be time enough to take that into account when it happens. It appears that the station at that place is only one mile by wagon road from Emmons. *We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities and the railway passenger or freight stations which accommodate them; also, that it is as short as, or shorter than the distance between many country depots or stations and the nucleus of buildings constituting the business center of the station village.* There is no suggestion that there are any special physical obstacles, or difficulties, in the way of traveling the one mile of highway between Emmons and Norman. Neither is there any claim that, in locating its stations at Twin Lakes and Norman the railroad company acted arbitrarily, unreasonably, or in disregard of the convenience of the public."

Again at pages 479-480, it is said:

"Our conclusion is, that these facts did not justify the commissioners, in the first instance, or the district court on appeal, in ordering the appellant to provide and maintain this station within seven-tenths of a mile of an existing station; *that, in the light of the facts, the order was unreasonable.*

We are firm believers in the existence as well as the exercise of the police power on the part of the state over common carriers, *but this power must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute. The undue multiplication of railway stations does not increase the traffic, either passenger or freight. It simply divides the existing traffic among more places. It unnecessarily increases the expense of doing the business (which comes out of the railroad company in the first instance, but at last usually out of the public), diminishes the quality of the service of the road to the public by the unnecessary frequency of stops of trains, and increases, to some extent, the hazards of railroad traffic and travel.*

As already suggested, in determining whether a station should be provided and maintained at a particular place, the interests, *not merely of that immediate locality, but also of the railroad company, and especially of the public at large*, must be taken into consideration. It seems to us that the commissioners, in making this order, must have been unconsciously influenced by the fact that the station at Norman was on the other side of the state line, *and that, if it had been on this side, they would never have ordered the appellant to provide another station within seven-tenths of a mile of it.*"

II.

The Decision Above Cited is the Law of the Case.

The relator has attempted to add to the statutory methods of obtaining a new trial of issues once adjudicated, by adopting the plan of having the same plaintiff bring a second suit against the same defendant, in the same court, upon the same cause of action, and, ignoring the proceedings and adjudication formerly had, proceed to try the case over again.

That the decision of the state Supreme Court, above cited, is still the unquestioned law of the state, is conceded. The only reasons advanced in support of a different conclusion, are the minor and insignificant increases in the population and business of Emmons. These so-called "changed conditions," will be considered; but the decision of the state court upon the first appeal is the law.

The decision of the state court now under review is an affirmance of the judgment of the District Court, by a divided Supreme Court. Such an affirmance does not overrule the *actual* decision. To give it that effect would be to hold that the District Court might thus overrule the Supreme Court.

An affirmance by a divided court establishes no precedent or principle.

Hanifan vs, Armitage 117 Federal Reporter 845.

In the case cited, which was in the Circuit Court for the Eastern District of Pennsylvania, the judgment of affirmance by a divided court, was ignored, and a former *decision* accepted and adhered to as the law of the case.

An affirmance by a divided court does not operate to settle the principles of law involved or have the effect of an opinion or decision.

Etting vs. the Bank of the United States, 11 Wheaton 78.
Benton vs. Windsey, 12 Peters, 27; 12 Curtis, 618.
Holmes vs. Jennison, 14 Peters, 540.

In *Morse vs. Gould*, 11 New York, 285, the Court says:

"Although the judgment of the Supreme Court * * * was affirmed *by this court*, yet, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, *but the question must be regarded as entirely open.*"

The Supreme Court of Pennsylvania held *In re Griel*, 171 Penn. State, 412, that a decree of a lower court, affirmed by a divided court, is not a decree or judgment of the Supreme Court, in support of which the rule of stare decisis can be invoked.

This affirmance is not a decision. It does not commit the appellate court to an approval or acceptance of the principles of law as decided by the trial court, nor does such affirmance overrule or modify the decision in the former decision, which decision, is properly recognizable in this court.

It was held in *Lessieur vs. Price*, 12 Howard, 59, *that* for the purpose of determining the *jurisdiction*, and as a question of practice, the judgment of affirmance would be treated as the judgment of the court, so as to authorize the removal of the case to this court by writ of error.

The rule seems to be, that while such an affirmance is a decision of the case, it has no value as authority. Applied to the case at bar: the true decision of the Supreme Court of

Minnesota, as to the law questions involved, is found in the opinion reported at 76 Minnesota, 469 in which the requirement that two stations be established and maintained upon the same railroad, *within one mile*, is unreasonable and results in depriving the plaintiff in error of its property without due process of law.

III.

It is only where the evidence is substantially different upon the second trial, that the case is not controlled by the first decision. There is no substantial difference between the evidence in this proceeding, and that produced upon the former trial. The substantial facts, upon which the rights of the parties rest are set out in the opinion in the former case (76 Minn., 469), and the record in the present proceeding. Comparison shows no important difference in the situation.

The distance by rail, and by wagon road, between the village of Emmons and the station at Norman, is unchanged.

While there are several more houses in Emmons than there were five years ago, there has been no substantial increase in railroad business; and it is to be borne in mind also, that in mustering a population of 246 people, the whole corporate territory, comprising *eight hundred acres*, is included. All this territory has but fifty buildings of all kinds, including business houses and dwellings, while the estimate in the former proceeding was limited to the "village." The size of this little hamlet furnishes no reason for the order, as the present needs are as well met by the facilities at Norman, as at the time of the former hearing. THE RAILROAD FACILITIES AT NORMAN ARE AMPLE. THIS IS NOT DENIED. The fact that the depot is not kept open nights, furnishes no reason for the establishment of another station to divide the small passenger traffic, which is so insignificant that no evidence was offered to show its extent.

The business of Emmons has not appreciably increased since the former decision. In 1896 the total amount of charges on outgoing freight, forwarded from Emmons, was $10,824.64 (see 76 Minn., 476); in 1901 it was but $12,798.34,

Record, page 38, folio 55), less than $2,000 in excess of the year 1896. In 1896, the total charges on freight received at Emmons was $4,689.80 (see 76 Minn., page 477); in 1901 it was $7,547.62, (Record, page 37, folio 53), an increase of less than $3,000 over 1896. *But in 1897, the charges on incoming and outgoing traffic at Emmons was over $20,000 (76 Minn., 477); which is equal to the business of 1901.* But, as Justice Mitchell says, in his opinion, the great bulk of the business is shipped in, and out, in carload lots, already amply accommodated by a side track at Emmons, (page 478, opinion), leaving freight representing only $4,535.67 of the freight charges, which will be benefitted by the establishment of a regular depot or station at Emmons. Of this sum but $2,794.77 was earned by the plaintiff in error, the remainder being advance charges earned by preceding carriers.

This sum represents "gross" earnings. Its "net" earnings amount to less than twenty per cent of that sum.

The order of the commission requires an investment of $14,265 to build and equip a yard, (Record, page 44, folio 65) and an expense of from $900 to $1,000 a year to maintain the station. This showing was not made on the former trial, and as all these features are made prominent in Judge Mitchell's opinion, they greatly increase the strength of our case.

Again, if a station be put in, as required by the order, it will be impossible to start a maximum train, going north, after stopping at the new station. *Record page 42, folio 62; also page 56, folio 88.* If the appellant makes the contemplated improvement in the alignment and grade of its road between Twin Lakes and Norman, its main line will be removed a half mile from the village of Emmons. *Record, pages 42 to 44, folios 62 to 66.*

The only conditions which can be urged by the relator to avoid the effect of the former decision are:

First: The increase in population.

Second: The condition of the public road leading to Norman.

The first of these facts, the increase in population, is wholly unimportant, for several reasons. As above noted, a large part of the apparent increase is due to the fact that the former estimate included only the village proper, while the present estimate of 246 people (transcript, page 18) includes a tract of eight hundred acres. It would probably be convenient for the people who live at the north end of the incorporated village, which is more than a mile from the business center, to have still another station established for their use; and equal necessity can be shown. The needs of this village of fifty houses, thirty or thirty-five of which are dwellings (Record, page 32, folio 45), are just as fully met by the station of Norman, as were the needs of the same village, at the time of the former hearing. The village is no farther from the station than it was in 1896; and *there is no complaint of the sufficiency of the station facilities to handle all business.* It is conceded that an agent is kept at the station "during the business hours of each business day," which is all that the statute requires; the only complaint being that he is not there nights; but it does not appear that there is any night passenger traffic, or any traffic not fully accommodated by the two daylight trains, each way.

As to the muddy roads, the point is not worthy of serious, and hardly of patient consideration. A railroad company is not responsible for the condition of the roads. Nor is it under any obligation to keep them in repair.

The village of Norman was first established. Years afterwards, Emmons was built up, by people who settled there voluntarily, knowing that there was a railroad station less than a mile away, and seeing for themselves the nature of the ground and the condition of the road to the station. The proposition that a railroad company must build and maintain two stations within one mile, because the wagon road between the two points is muddy, in the spring and fall, is too frivolous to merit consideration. Within the corporate limits, which extend to the state line, Emmons can take care of her own roads. Outside the corporate limits, the large territory which is claimed to be tributory to Em-

mons, should take care of the roads. The proposition that the appellant must expend more than $14,000 to establish a station, and pay out $1,000 per annum to maintain it because the road to its present station is muddy in the spring and fall, is not one which appeals to the judgment of the average man. Six per cent. on $14,265 (the cost of the station) is $855.90; the expense of maintaining the station is not less than $900. per year; the cost of keeping the building and platform in repair is ten per cent. of its cost, or $125. per year. The cost of this station would, therefore, be $1,880. per annum. The net earnings on the present business are about $500 per annum, estimating the proportion of gross earnings to net earnings from the report made by plaintiff in error to the relator. This business is now done through Norman station. If a new station is established, *both stations must be maintained.* The cost of maintaining the present station will not be lessened; and the business, which, in its entirety, does not now pay the expense of maintaining *one* station will be be divided between *two.*

Let us look at the testimony of relator's witnesses upon which this demand is based:

Mr. Fisk says, (Record, page 21, folio 26), that the road is "very poor most times of the year." That it is muddy, low and marshy.

Mr. Martinson says: "*In the spring of the year* it is very bad, *also in the fall. At different times* it is quite bad." (Record, page 25, folio 33). At page 39 the same witness says: "Well, I mean that *in the spring of the year* it is *almost* impassable, *for a few days.* * * * It is *hard* to get through there with teams."

Mr. Emmons testified, at page 33, folio 47, of the Printed Record: "Well, *during wet and stormy weather,* it is in poor condition. * * * It is *almost* impassable. It is too soft."

Mr. Thornby says, (Record, page 35, folio 49): "There *have been times* when they couldn't pass that road, when they had to take down fences, in the spring, and drive over the property of others, to get around it."

All that this proves, is the fact that this road, like all country roads, is muddy in the spring and fall; but to claim

that this fact furnishes a sufficient reason, or *any* reason for requiring this appellant to maintain two stations within one mile, to accommodate a business insufficient to properly maintain *one*, is beyond reason. The facts *upon which the former decision rest*, are unchanged. The fact remains, as stated by Justice Mitchell in the opinion, in which he said:

"We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities, and the railway, passenger or freight stations which accommodate them; also that it was as short as, or shorter than, the distance between many country depots or stations and the nucleus of business constituting the business center of station village." *(76 Minn., 478).*

III.

The Proposed Change of Alignment in the Track, Between Twin Lakes and Norman, is a Necessary and Authorized Improvement, Required by the Public Interests.

The right of the plaintiff in error to change its line in accordance with the proposed plan, submitted in evidence, is conferred by section 2750 of the General Statutes of 1894. That the proposed change would be for the public interest is manifest; that it should not be prevented, by the establishment of this station, is equally manifest.

It appears from the testimony of W. D. WHEELER that the maximum grade, to which the appellant purposes to reduce all its tracks, is six-tenths of one per cent. By reference to the plat, marked "Exhibit 3," and the testimony of Mr. Wheeler at pages 42 to 44 of the Printed Record, it will be seen that, at the point of the proposed change of alignment, there is a series of reverse curves, and a one per cent. grade. These curves constitute an exceedingly dangerous condition in operating fast passenger trains, and an exceedingly *difficult* condition in operating heavy freight trains. The aggregate of these curves, within the short distance of one mile and three-quarters north of Norman, is 216 degrees and 17 minutes. By the proposed change of alignment this curvature is reduced *four-fifths*, to 25 degrees and 17 minutes of

light curvature—a one degree, simple curve—in place of the dangerous reverse curves. The grade is reduced to a maximum of six-tenths of one per cent., and the line is nearly four hundred feet shorter. Any alteration in the line of a railway which benefits the railway company necessarily benefits the public.

As was said in *Fletcher vs. Railway Company, 67 Minn., 345-346*:

"Any change in the line, whereby the company is enabled to maintain the line at less expense, or operate it with greater safety and convenience and more economy, is, necessarily, a benefit to the public."

Surveys and estimates for this work have been made, and, if done, the village of Emmons will be one-half mile from the main track, while the stations at Norman and Twin Lakes will remain undisturbed. Emmons will still have its present side track facilities, and the appellant's track and railroad facilities will be greatly improved. I submit that it would be unreasonable to require the appellant to abandon a work of this character, involving the retention of a grade which would control and limit the size and tonnage of all trains moved upon that division, and increasing the risks and discomfort to every passenger, in order to give the citizens of this little hamlet a station within a mile of an existing station.

IV.

The Law will not Permit the Abandonment of the Station at Norman.

When the Minneapolis & St. Louis Railroad was built, the people of the township in which the station of Norman is situated voted a five per cent. tax to aid in the construction of the railroad, upon the condition that a station should be located and maintained within one mile of the northeast corner of Winnebago county, Iowa. Pursuant to such agreement Norman station was located, and has since been maintained. The removal of the station would not be permitted

and can be enjoined. To sustain the order, is to require the maintenance of two stations within one mile, while there is hardly business enough to warrant the maintenance of one.

V.

Neither Section 388, General Statutes of 1894, or Chapter 270, General Statutes of 1901, are Valid, When it is Sought to Apply their Provisions to the Facts in this Case.

Considerable space, in this brief, has been devoted to the discussion of facts which the writer hereof believes to be wholly unimportant, but as such facts furnish the only apparent reason for the failure of the state Supreme Court to follow its own decision in the case at bar, it has become necessary to give them attention, to the extent of considering their effect upon the application of the law of the case.

It is difficult to formulate any condition which will satisfactorily support the proposition that a railroad carrier can be lawfully subjected to the expense of maintaining two stations upon its road, within a distance of one mile, to accommodate the convenience—not the necessities—of an aggregate population of three hundred and fifty people. The unreasonableness of the proposition is emphasized by the fact, that the entire business of the combined municipalities is fully accommodated by the facilities already furnished; by the further fact that the entire business is scarcely sufficient to warrant the maintenance of one station, and still further, that the reasons urged for the additional station, are limited to a "muddy road" between the two small collections of houses, and personal inconvenience to the few people who go to the station to transact the small business of Emmons which is not handled in the village itself, upon the spur track, in car loads.

No complaint of the *insufficiency* of the facilities at Norman, is made, nor is there any evidence of insufficiency found in the record. The only conditions which furnish an excuse for the demand for railroad stations, to accommodate the business of this small community are (1) that the roads are muddy, and that the Emmons' end of this populous dis-

trict, has a few more houses and a few more people than the older end of the district, where the station is located. If this wholly unreasonable requirement must be performed, any railroad company doing business, can be driven into bankruptcy. The population of both towns does not equal that of a business building in a city of moderate size. The average business man walks a greater distance to go to his store or office, than the distance between the business centers of these two villages. The average distance which a traveller rides, or walks, to take his train, is greater than the distance between these two proposed stations. Nearly every merchant in town, country, or city, hauls his freight a greater distance to or from the depot than the distance between these two villages. The business of both, pays the plaintiff in error a net income scarcely sufficient to maintain one station; yet it is proposed that it should build a station for which there is no occasion, at a cost of more than $14,000, maintained at an annual expense of more than nine hundred dollars, stop its trains twice within one mile, abandon the necessary improvement in the alignment of its railroad, by which nearly two hundred degrees of dangerous reverse curvature is eliminated, and by which its grade is reduced and its line shortened, and for what? To relieve the municipality of Emmons from mending its roads so that the present depot, which lies at its door, can be reached without inconvenience to its handful of people. The proposition is unjust, unreasonable and wholly absurd. To compel the plaintiff to thus expend its money, is to take its property without due process of law.

The power of the Commission, to require the establishment and maintenance of a station, *when reasonably required by public necessity*, is conferred by the general Railroad and Warehouse Commission Act. This was decided upon the appeal in the former proceeding. It follows, necessarily, that the act of 1901, and the acts of which it is amendatory, are, and ever have been, wholly useless to confer authority in cases where the station is actually necessary. The apparent purpose of its enactment, is to enable the commission to compel railroad companies to construct stations which are not reasonably required. The act of 1901 (Chap. 270) can

have no other purpose. The act is a police regulation, pure and simple. If justifiable, it is an exercise of the police power of the state; not otherwise.

MR. COOLEY, in his work on *Constitutional Limitations, 5th Ed., page 707*, defines the police power as

"the power vested in the legislature, by the constitution, to make, ordain and establish all manner of wholesome and *reasonable* laws, statutes and ordinances, either with penalties or without, *not repugnant to the constitution.*"

The same writer says, at page 713, that police regulations

"can be such only, as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise."

The same language is quoted and adopted in *Black on Constitutional Prohibitions, Sec. 62.*

Again, it is said in *Cooley on Constitutional Limitations, Sec. 577:*

"The limit to the exercise of police power must be this: The regulations must have reference to the comfort, safety or wellfare of society; they must not be in conflict with any other provisions of the charter; they must not, under pretense of regulation, take from the corporation any essential rights and privileges which the charter confers. In short, they must be police regulations in fact; and not amendments of the charter, or curtailments of corporate franchises."

The fact that the establishment of a station at Emmons might be *convenient* to the public, furnishes no reason or authority for its establishment. The police power of the state does not extend to cases of public convenience; it is limited to cases of public *necessity.*

Black on Constitutional Prohibitions, Sec. 64, says:

"There is no possibility, upon any principal of logical deduction from the adjudged cases, or the nature of the subject, of stretching the limits of the police power so as to make it include matters which are merely connected with

the *convenience* of the public. There are decisions which might seem, at first blush, to lend countenance to such a proposition, but an attentive consideration will show that they neither used the term in its broad or general sense, or had reference to matters concerning the *safety* of the people, not their *convenience.*"

In the case of *State vs. Noyes, 47 Maine, 212-213,* Chief Justice Tenney says:

"The counsel for the government has called our attention to many statutes and decisions which, it is contended, look more to the public convenience than to public safety; and judging from the ability and untiring diligence manifested in his argument, we cannot doubt that authorities favoring his views would be found, if they exist. But we have been unable to discover in any of them the doctrine contended for, that legitimate police regulations will extend to matters conducive to the convenience of the public when they conflict with the recognized rights of other parties."

The exercise of the police power is subject to the limitation of the federal constitution. Many, in fact the majority of police regulations are, *prima facie,* in violation of rights, declared by the constitutions; but are upheld, because of the necessity of a reserved power, in the state, to protect the health, persons and property of the public and its individual citizens. The public power is a "reserved power." Its exercise is only justified by *reasonable necessity.* The provisions of the constitution are limitations upon the power, and, if a law be either unnecessary or unreasonable it is void; because of the constitutional limitation. A law cannot be upheld because the act which it authorizes is *convenient.* It must be a *necessity.* The police power is founded upon the maxim, "Use your own property in such a manner as not to injure that of another."

Whether a law is necessary and unreasonable, as applied to each case is a judicial question for the court; and, if unnecessary or unreasonable, the court may declare it void.

Tiedeman's Limitations of Police Power, p. 593, Sec. 194.

Evison vs. Ry. Co. 45 Minn., 373, 375.

The power of the legislature, as well as of the courts, is limited to the requirements of the community. When property is taken unnecessarily and without reason, the taking is not due process of law. That the taking is under *form* of law, does not render the act less a violation of the constitution.

Railway Company vs. Chicago, 166 U. S., 226.
Railway Company vs. Nebraska, 164 U. S., 403.
*Cooley's Const. Limitations, 5th Ed. 435, (*356.)*
County of San Mateo vs. Ry. Co., 13 Fed. Rep., 722.
Foule vs. Mann, 53 Iowa, 42.

VI.

Chapter 270, General Laws of 1901, is Void upon its Face. It is a Mandatory Statute, Providing for no Hearing; No Judicial Determination as to Whether or Not the Station is Necessary.

The act of 1901 (Chap. 270 G. L. 1901) is absolutely void. It does not make the establishment and maintenance of the proposed station, dependent upon the reasonableness of the requirement, or the necessity for the station. It is not due process of law. Its enforcement takes the appellant's property, without due process of law, and deprives it of the equal protection of the laws, and is therefore violative of the Fourteenth Amendment to the Constitution of the United States.

Railroad Company vs. Minnesota, 134 U. S., 418.

Under the act of 1901, it was the duty of the commission to make the order, without regard to the necessity, or reasonableness, of the requirement. Under the act of 1901, the appellant had no right to offer evidence of any kind or character; but the relator's counsel, realizing that, under the decision in *Railway Co. vs. Minnesota, supra*, the act is void, tried the case in the district court, upon the theory that the order was made under the general railroad and warehouse commission act.

Chapter 270, Gen. Laws of 1901, is also violative of section 10, article 1, of the constitution of the United States;

because it violates and impairs the obligation of the charter contract between the state and the plaintiff in error. This contract includes the right of the plaintiff in error to reasonably control its own property; to select, under reasonable limitations, the location of its stations; to earn a fair, and reasonable, profit and to be free from cumpulsory control, resulting in the unneccessary, and unreasonable, dissipation of its earnings in the construction and maintenance of facilities and instrumentalities of commerce, not required for the reasonable accommodation of the public needs. Any law, the enforcement of which the value of the contract is diminished, impairs its obligation.

In the case of *Bank vs. Sharp, 6 Howard, 327*, the Supreme Court of the United States says:

"One of the tests that a contract has been impaired, is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired *at all*. This is not a question of degree, or manner, or cause, but of encroaching, *in any respect*, on its obligation, dispensing with any part of its force."

The enforcement of such requirements as the one embodied in the order of the commission, by which stations may be located by compulsion less than a mile apart, is destructive of the value of the plaintiff in error's franchise and diminishes the value of its charter contract.

VII.

The construction placed upon the Act of 1901, by the state Supreme Court, has practically invalidated it. By the language of the Act itself, no room is left for judicial determination as to the necessity for the station, when demanded by the inhabitants of an incorporated village. In this proceeding, the Act is so construed as to make it meaningless, except as a declaration changing the burden of proof. The former decision of the questions here involved, which was favorable to the contention of the plaintiff in error, was placed upon the ground that the requirement of the Com-

mission was so unreasonable, that enforcement of the order would result in taking the property of the railroad company without due process of law. That this is the issue, is expressly stated in the opinion in the present proceeding. *Record, pages 65-66.* The issue presented and decided is purely a federal question. It seems a novel proposition that under any law,—any rule of evidence,—any statute,—the burden of proof should rest upon a railroad company, to show affirmatively that two stations are not required upon one mile of railroad. The burden of establishing an apparently self-evident proposition is rarely imposed by statutory enactment. A simple statement of the proposition herein involved, would seem to establish its correctness. A condition which reasonably necessitates the establishment of two railroad stations, upon the same railroad, within one mile, is so exceptional as to call for proof of the necessity. *As applied to the facts in this case,* the Act of 1901, is unreasonable and void. *As applied to the facts in this case,* any statute which assumes to authorize this wholly unreasonable order is violative of the federal constitution.

Respectfully submitted,

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